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**REDACTED VERSION**
**FOR PUBLIC INSPECTION**

**BY ELECTRONIC FILING**

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, DC 20554

Re: WC Docket No. 02-214, *Application by Verizon Virginia Inc., Verizon Long Distance Virginia Inc., Verizon Enterprise Solutions Virginia Inc., Verizon Global Networks Inc., and Verizon Select Services of Virginia Inc., for Authorization To Provide In-Region, InterLATA Services in Virginia*

Dear Ms. Dortch:

This is a notice of two ex parte communications between AT&T and Commission staff members concerning this case. On October 4, 2002, Amy Alvarez, Michael Lieberman, Chris Nurse and I, all representing AT&T, participated in a teleconference with Richard Kwiatkowski, Scott Mackoul, Uzoma Onyeije, Tamara Preiss, Victoria Schlesinger, and Jacqueline Spindler to discuss switching price benchmarking, switching costs, and regulatory and cost implications of Verizon's loop provisioning policy. In a separate meeting, Amy Alvarez, Michael Lieberman, Chris Nurse, Robert Quinn and I participated in a meeting with William Maher, Jeffery Carlisle, Rich Lerner, Brent Olson, Uzoma Onyeije, Tamara Preiss and Victoria Schlesinger to discuss the pricing and non-pricing issues raised by AT&T in the above-referenced proceeding.

The discussions were based largely on the record previously submitted by AT&T. The remainder of this letter identifies additional points made by AT&T during the October 4 meetings with Staff.

## I. VERIZON'S "NO-BUILD" LOOP PROVISIONING POLICY.

Verizon makes clear that its policy for provisioning loops to CLECs constitutes unlawful discrimination, precludes Verizon's loop rates in Virginia from benchmarking with Verizon's loop rates in New York, and has resulted in non-TELRIC compliant loop rates.

As AT&T explained in its September 12 reply comments (at pp. 9-13), Verizon discriminates against CLECs in provisioning loops to CLECs. Since May 2001, Verizon has enforced a discriminatory and anticompetitive "no facilities" policy, whereby Verizon refuses to provide unbundled access to such loops when it would require "additional construction." The "additional construction" that triggers Verizon's "no facilities" policy includes such routine or minor tasks as installing a repeater shelf in the central office, customer location, or remote terminal; providing an apparatus/doubler case; placing fiber or a multiplexer; adjusting the multiplexer to increase its capacity; placing riser cable or a buried drop wire; or placing fiber or copper cable to replace defective copper cable or provide spare capacity. Indeed, Verizon admitted during its Section 271 hearings before the Virginia State Corporation Commission that it will deny a CLEC's UNE DS-1 order for "no facilities" even when all that Verizon Virginia must do to provide the requested service is open a cable sheath to splice existing pairs into an existing apparatus case. By invoking its "no facilities" policy, Verizon rejects up to 39 percent of CLEC orders for high capacity loops in Virginia—a rejection rate that dwarfs the corresponding rejection rates of other BOCs, which are typically in range of three percent. These points were amply raised in the Section 271 hearings before the Virginia SCC administrative law judge, and are amply supported by the record there. *Accord*, Verizon Sept. 19 ex parte letter (attachment re facility build policy).

Moreover, Verizon's discriminatory provisioning policy extends to ordinary voice-grade loops, not just DS3 or DS1-grade loops, as made clear in an exchange of correspondence between the Virginia SCC and Verizon concerning Verizon's failure to provision voice-grade loops for Cavalier. *See* letter dated Aug. 30, 2002 from William Irby (Virginia SCC) to Robert W. Woltz, Jr. (Verizon) (attached); Sept. 6, 2002 reply from Mr. Woltz to Mr. Irby (attached).[1]

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[1] Verizon's reliance on the Commission's prior 271 orders for Pennsylvania, New Jersey and New Hampshire is misplaced. The record on the extent and significance of Verizon's "no facilities" policy in Virginia stands in stark contrast with the "limited" records on the same issues

Verizon defends its provisioning policy on the grounds that (1) the work required to meet the requests of CLECs for additional loops would be substantial; (2) Verizon has no obligation under Section 252 to undertake such work; and (3) Verizon's provisioning policies are not discriminatory because Verizon offers all comers—including CLECs—the opportunity to obtain access to such capacity at Verizon's retail rates for its special access services (Oct. 1 Verizon ex parte letter re high capacity loops). These arguments are both untrue and legally irrelevant.

First, Verizon's suggestion that it applies its "no facilities" policy only when provisioning would require major construction is simply untrue. As noted by the CLECs in their comments, Verizon applies the policy to garden variety copper loops, and invokes it even when the "construction" merely entails placing a splice in an existing copper loop facility that already runs from the central office all the way to the customer premises.

Second, Verizon's conduct is clearly constitutes unlawful discrimination under 47 U.S.C. §§ 251(c)(2)(D), (3) and §§ 271(c)(2)(B)(ii), (iv). While refusing to provide loop capacity to CLECs in the form of UNEs, Verizon aggressively solicits and fills orders received from its retail end users under the same circumstances. In the 271 hearing before the Virginia SCC, Verizon acknowledged that it "will build for the retail side," but not for CLECs. This discrimination constitutes a major barrier to competition in Virginia. When Verizon refuses to provision an unbundled DS1 loop on the pretext that "no facilities" are available, the only alternative open to the CLEC (other than abandoning the potential retail customer to Verizon) is to obtain a special access circuit from Verizon. Recurring special access charges are approximately five times the recurring cost of a DS1 loop plus cross-connect. AT&T Reply Comments at 10.

It is textbook law that refusal by a vertically integrated firm with monopoly power over an input (here, Verizon) to sell essential intermediate inputs (i.e., unbundled loops) to non-integrated wholesale customers (i.e., CLECs) at prices and other terms comparable to the implicit terms by which the integrated firm supplies the same inputs to its own retail operations constitutes unlawful discrimination. *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-74 (1973); *Conway Corp. v. FPC*, 510 F.2d 1264, 1270-74 (D.C. Cir. 1975); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 928-31 (2d Cir. 1981).

Third, apart from its discriminatory nature, Verizon's provisioning policy precludes the Commission from finding that Verizon's loop rates in Virginia (a) benchmark with Verizon's New York rates or (b) comply with TELRIC. A necessary precondition for a meaningful benchmark comparison is that the services whose rates are compared must cover comparable facilities or services. Verizon's current "no facilities"

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in the Pennsylvania and New Jersey 271 proceedings, and the "scarce" record in the New Hampshire proceeding. *See* New Hampshire 271 Order ¶ 114.

provisioning policy, however, renders a "loop" in Virginia clearly a less costly and value input than the corresponding "loop" that the Commission and the New York Public Service Commission understood Verizon to be providing during the New York 271 proceeding. In the New York proceeding, the purchase of a loop by a CLEC was thought to include the implicit right to be additional loops at the same price. Under Verizon's subsequent provisioning policy in Virginia, there is no comparable right.

The option of supplying additional loops on demand has both a cost to Verizon (i.e., the carrying cost of the spare capacity, measured by fill factors, needed to make the availability of additional loops a meaningful one) and a value to CLECs. Hence, a simplistic benchmark comparison of Virginia loop prices with New York loop prices is as illegitimate as the conclusion that a stripped down entry-level automobile is reasonably priced because it offered for sale at the same price as a fully loaded model from the same manufacturer.

Verizon's provisioning policies also preclude a finding that Verizon's loop rates in Virginia are TELRIC compliant. Verizon's current position that it has no duty to extend, augment, or otherwise reconfigure its network to provide facilities to CLEC's where facilities are unavailable (*see*, *e.g.*, September 6, 2002 Woltz letter to Irby, *supra*) is directly at odds with the cost study inputs and assumptions underlying the UNE loop rates set by the Virginia SCC in 1998 and remaining in place in Virginia today. Correcting the cost study inputs and assumptions to reflect Verizon's no-build policy would result in a substantial reduction in UNE loop rates.

First, contrary to its no-build policy, Verizon's cost studies explicitly provided for investment in new facilities where such facilities were not constructed in the base year. The Verizon cost studies from which the current UNE loop rates are derived used the CAPCOST Plus model to develop annual cost factors ("ACF") to convert forward-looking investments to recurring annual charges. The CAPCOST Plus model, based on a series of study inputs, computes annual factors for return of investment (depreciation), return on investment, income taxes, direct operating expenses, support expenses, property taxes and other expenses. For the calculation of return of investment, return on investment and income taxes, the CAPCOST Plus model – based on the Virginia State Corporation Commission's ("SCC") Final Order – was run for five separate vintages. Each vintage, in the CAPCOST Plus parlance, represents a study year. In specifying five vintages, the SCC instructed Verizon (then Bell Atlantic) to run the CAPCOST Plus model for five years. For each vintage, the CAPCOST Plus model provides for incremental investment to serve the increase in demand input to the model for that year. Over five vintages, Verizon's cost study provides for an additional **[BEGIN VERIZON PROPRIETARY]** ************* **[END VERIZON PROPRIETARY]** of forward-looking investment to accommodate anticipated increased demand after the first year. Table 1 sets forth the increased demand by vintage reflected in the Verizon cost study.

**Table 1**
**Summary of Demand Reflected In Verizon Cost Study**

**[BEGIN VERIZON PROPRIETARY]**

| Vintage | Study Year | Demand | % Increase In Forward-Looking Investment |
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**[END VERIZON PROPRIETARY]**

Under Verizon's no-build policy, this additional investment would have to be removed from the cost study to make the cost study assumptions consistent with the policy.

Second, the fill factors within Verizon's cost studies provide for substantial amount of spare capacity to account for future increased demand, customer churn, administrative spare requirements and defective pairs. The loop cost studies include a 50 percent fill for metallic distribution cable, which explicitly assumes one spare distribution air for every working distribution pair included in the study. The study also assumes a 77 percent fill for metallic feeder cable, an 85 percent for digital loop carrier electronics investment and 90 percent fill for fiber feeder cable.

Under Verizon's no-build policy, there would be no need to provide for spare capacity in the network to provision for future anticipated growth or for customer churn. Thus the fill factor for all loop components would only be required to account for administrative spare requirements and defective pairs. A network wide fill factor of 90 percent would provide adequate capacity for administrative spare and defective pairs.

Third, the Verizon cost study ACF's explicitly provide for both repair expenses (R-dollars) and maintenance and rearrangement dollars (M-dollars). R-dollars generally include expenditures covering the restoration of telephone plant to proper working conditions as the result of damage or a defective condition and should be included in the cost studies, even under Verizon's no-build policy. Rearrangements and changes, or M-dollars, typically include telephone plant operating expenses which are not repair expenses and include the physical movement of telephone plant or the rearrangement or re-configuration of telephone plant. Clearly inclusion of expenditures for any rearrangement of outside plant is inconsistent with Verizon's no-build policy and any such costs should be removed from the study.

Adjusting Verizon's loop cost study to eliminate those cost components that are in conflict with its no-build policy would produce a considerable reduction in loop costs. For example, adjusting the CAPCOST Plus model to run only a single vintage, thereby removing any provision for incremental investment to serve future demand, changing the utilization factors to 90 percent to provide for only administrative spare and defective pairs and removing the M-dollars from the ACF calculations would reduce the statewide average two-wire loop rate in Virginia by more than $3.00 per line per month. Four-wire loop rates and DS1 loop rates would also decline considerably if these adjustments were implemented in those cost studies.

For the foregoing reasons, Verizon Virginia's no-build policy is inconsistent with the inputs and assumptions of the underlying cost studies. It is a violation of the causation element of TELRIC to charge UNE prices that attribute to UNEs the costs of capacity and other costs that are not caused by the provision of those UNEs. Correcting for these inconsistencies would result in a substantial reduction in loop rates.

## II. VERIZON DOES NOT PROVIDE REASONABLE AND NONDISCRIMINATORY ACCESS TO DIRECTORY LISTINGS.

As AT&T and other CLECs have explained in their comments, Verizon fails to provide nondiscriminatory access to directory listings in accordance with checklist item eight (47 U.S.C. § 271(c)(2)(viii)). There is an enormous disparity between the rate of error in Verizon's directory listings of CLEC subscribers, and the far lower rate of error in Verizon's listings of its own retail subscribers. AT&T Comments at 16-17; AT&T Reply Comments at 13-15; Cavalier Comments at 21-26; AT&T ex parte handout filed Sept. 12, 2002.

Verizon's September 25 ex parte filing on the same issue merely underscores the discriminatory character of Verizon's directory listing processes. First, Verizon's own data confirm the infinitesimal rate of error in the white pages listings of Verizon's own customers: 13 customer complaints (equivalent to an annualized total of approximately 17 customer complaints) out of approximately two million customers. *Id*. at 9 (table).[2]

Second, VZ acknowledges that it does not use for its own retail customer listings the Listing Verification Report ("LVR") that Verizon requires CLECs to use to for their retail customer listings. *Id*. at 9 ("Verizon does not use the LVR process for retail").

[2] The low level of complaints reported by Verizon for the white page listings of *CLEC* customers—three complaints during the same period—is meaningless. A retail subscriber to a CLEC is not a retail subscriber to Verizon, and a consumer complaint to Verizon about the white pages listing of a CLEC customer would be misdirected. As noted in Cavalier's comments, the volume of complaints that it receives from its own customers about white pages listings is several orders of magnitude higher.

Verizon's refusal to use the LVR—and incur the additional labor and other costs needed to use it—confirms the discriminatory nature of Verizon's quality control processes.

## III. THE JULY 12 REPORT OF THE SCC HEARING EXAMINER IS NOT A VALID ORDER OF SCC, AND ITS FINDINGS ARE NOT ENTITLED TO THE DEFERENCE OR WEIGHT GIVEN TO STATE CONSULTATIVE DECISIONS.

In its September 12 reply comments, AT&T explained why the July 12 report Alexander Skirpan, an administrative law judge of the Virginia SCC, and the SCC's August 1 cover letter to the Commission are not lawful orders of the SCC, and contain no findings that the Commission may give deference. The SCC's failure to issue a valid consultative decision—while a choice within the SCC's authority—requires the Commission to base its policy findings on a de novo review of the record below. Giving deference to the findings in the Skirpan report would be reversible error, for both the ultimate conclusion of the report (that Verizon's 271 application should be approved) and many of its subsidiary findings are adverse to AT&T and other CLECs. *See, e.g.*, AT&T Reply Comments at 21-23.

Verizon's ex parte responses on this point (Verizon Sept. 26 ex parte letter on effectiveness of Skirpan report and SCC cover letter) do not withstand scrutiny. First, the precedent cited by Verizon from other states is irrelevant. Under Virginia law, SCC pronouncements lack force (and, equally important, are unreviewable) unless issued as official orders. *See* AT&T Reply Comments (Sept. 12, 2002) at 17-19. The single exception cited by Verizon—the provision of the Virginia Electric Utility Restructuring Act requiring the SCC to submit annual reports on competition to the Virginia state legislature—proves AT&T's point. In clear contrast to the unauthorized pronouncements at issue here, the statutory reports cited by Verizon are explicitly authorized by the Virginia statute. Va. Code § 56-596.D. Moreover, those reports are in any event are merely recommendations to the Virginia *legislature*, and the SCC's recommendations cannot take effect without further action by a legislative body that is directly accountable to the voters. *Id*.

Verizon's further claim that due process requirements have been satisfied because AT&T and other CLECs were permitted to make a record before the hearing examiner is frivolous. Due process includes not only the right to make a record, but to a decision based on record findings supported by the record. *Atchison, T. & S.F. Ry. v. Wichita Board of Trade*, 412 U.S. 800, 806, 808 (1973). Giving presumptive weight to Skirpan report as if it were a duly authorized decision of the Virginia SCC would constitute to an administrative shell game. Such action would deny AT&T and other aggrieved parties any meaningful ability to challenge Mr. Skirpan's findings on their merits at any stage of the administrative process. Hence, while the Commission is entitled to consider directly the factual record that the parties submitted to Mr. Skirpan, his report itself is entitled to no more deference than the views of any private citizen.

Very truly yours,

David M. Levy

*An Attorney for AT&T Corp.*